No. 83-6736

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

ORIGINAL

TERRY MELVIN SIMS

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

WHETHER THE TRIAL JUDGE IN THIS CAPITAL CASE COMMITTED ERROR OF CONSTITUTIONAL MAGNITUDE IN RESTRICTING AND ULTIMATELY CUTTING OFF ALTOGETHER DEFENSE COUNSEL'S CROSS-EXAMINATION OF THE KEY PROSECUTION WITNESS.

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AUTHORITIES CITED

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida filed on November 3, 1983.

CITATION TO OPINIONS BELOW

The judgment upon which petitioner seeks plenary review is the decision of the Supreme Court of Florida upholding his conviction and death sentence. The opinion of the Florida Supreme Court was issued on November 3, 1983 and was modified on denial of rehearing on January 19, 1984. The revised opinion of the Supreme Court of Florida is reported as Sims v. State, 444 So.2d 922 (Fla. 1983) and is set out as Appendix B to this petition. The order denying rehearing is attached as Appendix C.

JURISDICTION

The judgment of the Supreme Court of Florida was filed on November 3, 1983, and rehearing was denied on January 19, 1984. See Appendix D. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States. The Honorable Lewis F. Powell, Jr., Associate Justice of the Supreme Court of the United States, issued an order extending the time within which to file this petition to and including April 18, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States. It further involves Section 921.141, Florida Statutes (1977), entitled "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence." Because of its length, the statute is set out in its entirety in Appendix A.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Defense counsel timely objected when the trial court summarily cut off cross-examination of the state's key witness (R 468); counsel had twice been rebuked in his requests for bench conferences during the cross-examination (R 460-61, 462). The question was then raised in Point I of petitioner's brief on direct appeal to the Supreme Court of Florida, where he alleged that "the trial court erred in summarily curtailing appellant's cross-examination of the key prosecution witness." The Florida Supreme Court, in its initial opinion dated November 3, 1983, concluded that trial counsel's objection was insufficient to preserve the issue for appellate review. See Appendix D. Mr. Sims challenged this finding in his timely filed petition for rehearing. Id. The Florida Supreme Court agreed and modified its opinion accordingly. Id. That court's final opinion clearly resolved the issue on the merits:

> Appellant's first point on appeal is that he was denied his sixth amendment right to cross-examine a witness when the trial court curtailed defense counsel's cross-examination of Baldree. He relies on Coxwell v. State, 361 So.2d 148 (Fla. 1978). The asserted error occurred when defense counsel began questioning Baldree about the individual whom appellant was said to resemble. We do not find that the court's ruling was a curtailment of cross-examination requiring reversal under Coxwell v. State. Here the defense was allowed extensive cross-examination of the witness and the state's objection and the court's ruling thereon came only after the defense went into matters beyond the scope of Baldree's direct testimony. The defense did not ask for an opportunity to make a proffer to show the relevance of the information it was seeking to bring out. We find no error in the judge's ruling.

Sims v. State, 444 So.2d 922, 924 (Fla. 1983).

STATEMENT OF THE CASE

Terry Melvin Sims was convicted and sentenced to death for the murder of George Pfiel, an off-duty deputy sheriff who entered a pharmacy while it was being robbed by four men. The conviction and sentence were affirmed by the Florida Supreme Court. Sims v. State, 444 So.2d 922 (Fla. 1983). This petition followed.

Because resolution of the question presented requires understanding of the significance of the testimony of Curtis Baldree, in the context of all the evidence presented at trial, that evidence must be discussed in some detail.

A. The State's Case.

Two of the participants in the robbery, Curtis Baldree and B. B. Halsell, were "the state's chief witnesses." Sims v. State, 444 So.2d 922, 923 (Fla. 1983). Both received deals for their testimony. Although originally charged with murder and robbery, Baldree entered into a deal with the state in which he pleaded guilty to two misdemeanors and was sentenced to two years in the county jail (R 445-446).[1] Halsell's deal was that he pleaded guilty to one count of robbery with a ten year cap on his sentence (R 299-300). Baldree and Halsell shared a jail cell while waiting to testify in this case (R 344).

Halsell testified that he met in Jacksonville with Baldree, Sims and one Eugene Robinson (R 302). Driving two cars, a Cadillac and a stolen Matador (R 303), they began driving to Tampa for the purpose of buying ignition pullers (R 304). However, they stopped in Orlando overnight (R 303), and while there they stole a Camaro (R 305-306). Halsell checked into a Quality Inn motel across the road from the pharmacy that eventually was robbed (R 308). After staying at the motel for several hours (R 308), Halsell said, he took Baldree and Sims to pick up the Camaro; Robinson drove the Cadillac (R 310). He said that Robinson had given them all guns (R 313-314) and that the robbery was Robinson's idea (R 332).

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1 The symbols "T" and "R" respectively will be used herein to refer to the transcript of trial proceedings and the record-on-appeal in the Florida Supreme Court below.

Halsell parked the Matador behind the shopping center as a "switch" car (R 311). He said he saw Baldree and Sims enter the pharmacy (R 313). About five minutes later he saw a man walking up to the door of the pharmacy (R 314), saw him peek in the door and then a "bunch of guns went off" (R 315). The man had fired first and then someone inside returned fire (R 315, 351). Halsell said that after the man fell, he saw Sims come out the pharmacy door in a crouch; then Sims went back inside (R 315). Halsell and Robinson then left picked up the Matador and went back to the motel (R 316). According to Halsell, Sims arrived immediately at the motel room and was bleeding (R 317) and said that he "shot a cop or a truck driver" (R 353). The three then left the motel and went to a store to listen to a police scanner (R 317), and then Halsell went back to the motel to check on Baldree (R 318). He found Baldree in the motel, they went back to get the others and then checked into another motel (R 319). After about an hour they departed for Jacksonville where Halsell said they left Sims at Baldree's house and Halsell went to Robinson's house (R 320-321).

Halsell further testified that he had been a drug addict since age 18 (R 301, 325), that he injected morphine on the days prior to and day of the offense (R 326), that he and was a "professional criminal" since he left high school (R 300), that he had five aliases (R 342), that he had committed more than 100 burglaries (R 300) and a few robberies (R 323) mostly for drugs (R 301) and that he had been convicted "several times" (R 354). Halsell told Sims' prior attorney that he would do "whatever he felt was necessary ... to make sure that his sentence was ... what he wanted it to be." (R 659).

Baldree, the other alleged accomplice, also testified. Baldree said that he went into the pharmacy first with Sims behind him (R 432). Baldree went to the back of the store to the pharmacy counter and got the pharmacist (R 433). Baldree said Sims ordered the customers and employees to come to the back of the store and go into the bathroom (R 433-434). Baldree told the pharmacist to give him certain drugs (R 434); Baldree thought he was stalling and cocked his pistol in the pharmacist's face (R

435). He said that Sims came to the back of the store to ask how things were going and then went back to the front (R 435). Baldree said that shooting started at the front (R 435). The pharmacist grabbed Baldree's gun and they wrestled for it; Baldree pulled away and fired his gun (R 436). Baldree said that he then went to the front of the store and the pharmacist went into the bathroom (R 436). According to Baldree, Sims said "I've just killed a cop" and "when he came in the door I thought he was a truck driver" (R437). Baldree testified that Sims said that they had fired simultaneously (R 437). He said Sims was shot in the hip (R 438) and then began crawling towards the front door (R 438). Baldree went out the back door and commandeered a car (R 438). He left the car, ran through the woods toward the Quality Inn, threw his gun in a lake, and went back to the motel where he waited for Halsell (R 438-439). They went to another motel and then to Jacksonville (R 442). Baldree said he took Sims to Baldree's apartment where his girlfriend, Joyce Gray, was also living (R 443). On Sunday morning Robinson came over, according to Baldree, and they took Sims to Sims' trailer in Lake City (R 443). Baldree said that on January 3, 1978 he and Robinson picked up Sims and took him to a Dr. Dunbar in St. Mary's, Georgia (R 444-445). They then returned Sims to Lake City (R 445).

Baldree testified that he had spent twenty-four years in state and federal prisons for crimes including armed robbery, sale of narcotics, attempted murder and escape (R 426-427). He denied being a drug addict (R 446) although he admitted using drugs on the day of the offense (R 451, 452, 459) and other witnesses, including Halsell, described him as a junkie or addict (R 327, 328, 547, 559, 586). He made his living selling drugs (R 448). He had been convicted of crimes "approximately twelve" times (R 466). He agreed to testify in return for pleas of guilty to two misdemeanors (R 445) and told Sims' prior attorney that "he would do just about anything to keep that deal...." (R 659).

The account of the robbery and the shooting was confirmed by Pharmacist Robert Duncan, Duncan's wife and daughter, both of whom worked in the store, and two customers. Mr. Duncan's wife, Caroline Duncan, was working in one of the aisles when her daughter motioned to her to look at a man who was holding a gun (R 388-391). They then went to the back of the store (R 391). She said Sims resembled the man she saw (R 392). Colleen Duncan, their 16-year old daughter, was working at the cash register in front of the pharmacy, and a man, who had been in the store five minutes (R 405), approached her with a gun and told her to go to the back of the store (R 403-405). She said Sims was the man (R 405), although she had failed to pick out his photograph in a prior lineup (R 411-414) and had since seen a picture of Sims in the newspapers (R 414, 419). William Guggenheim was a customer in the store waiting at the pharmacy counter (R 478-479). He saw a man with a gun next to the pharmacist, Mr. Duncan (R 480-481). The man ordered Guggenheim around the counter, but instead Guggenheim ran to the front of the store (R 481-482). He said a man with a gun confronted him and asked for his wallet (R 482-483). Guggenheim then saw a man in a gray suit enter the store and then back out (R 485-486). Guggenheim said Sims was the man with the gun (R 487), although he also had been unable to identify Sims' photograph (R 495-496) and had seen newspaper and television reports (R 499-500). Sue Kovec said she saw Sims in the front of the store (R 503, 505) but she did not see a gun in his hand (R 506). She said she went to the back of the store and stayed by the pharmacy counter (R 503-504).

B. The Defense Case

Bonnie McCumbers testified for the defense that she lived in a trailer in Lake City during the time of this offense (R 596). She lived with Sims (R 596) and testified that Sims was home every night between Christmas and New Year (R 598). Ms. McCumbers went to St. Augustine on January 3rd to pick up her social security check (R 599). On the same day she picked up Robert and June Hart and brought them to her trailer in Lake City (R 599). Ms. McCumbers testified that Sims showed no sign of a gunshot wound (R 599). June Hart testified that on January 3rd

she went to Sims and Ms. McCumbers' trailer in Lake City and stayed along with her husband for several weeks (R 612), because her husband was out of work (R 616). She saw Sims that night and he was walking normally and was not in pain (R 612-613). Also, after Christmas and before New Year's, she telephoned the trailer and Sims answered (R 614). Robert Hart also saw Sims and he was walking normally, with no evidence of a gunshot wound (R 623).

Joyce Gray, Baldree's common law wife (R 557-558), was living with Baldree at the time (R 558). On January 3, 1978, Baldree was with her in Atlanta for Ms. Gray's doctor's appointment (R 560) and was in her presence the entire time (R 565). Sims tried to admit into evidence a gasoline credit card receipt signed by Baldree in Atlanta on that date and the doctor's bill (R 560), but the court would not admit them into evidence (R 564). She also testified that Baldree used drugs daily (R 559). Ms. Gray said that she saw no one staying at their apartment between Christmas and New Year's (R 570).

Ann Robinson, the wife of Gene Robinson, testified that Halsell and Baldree were heavy drug addicts and that Baldree hallucinated constantly (R 545, 547). Baldree was a robber and Halsell was a burglar and a robber (R 548). The two worked as a team (R 548). Sims was not associated with Baldree and Halsell (R 550). Baldree's reputation was dangerous, treacherous and untrustworthy (R 550).

Gale Milliken lived with Halsell for four years (R 585). He and Baldree were thieves and drug addicts (R 585-586) and Baldree hallucinated on drugs (R 587). Halsell and Baldree worked together (R 588). Both Baldree and Halsell had previously falsely accused people of crimes (R 535, 587-588).

Officer Richard Schaffer also testified for the defense. He was the first officer on the scene, and he left his car and went toward the pharmacy (R 523-524). The officer saw the door partially open and a man crouched down inside behind the door (R 525). He saw the man run back through the pharmacy (R 517). After the officer got up to the pharmacy he heard a shot fired (R 527). The officer crouched in front of the pharmacy and within a few minutes a plain clothes deputy sheriff came (R 528-529). The

officer had the deputy take charge (R 529). The officer then went behind the building and tried to overcome an Oldsmobile that had been commandeered (R 529, 530, 532).

Carol Weatherby, a pharmacy technician at the store (R 538), was behind the pharmacy counter with Mr. Duncan at the time she first saw Baldree (R 538-539). She said that when the first shot was fired Guggenheim was in the back of the store (R 541) and that she, Guggenhiem and Kovec did not run down the aisle until two other simultaneous shots were fired (R 541).

Ralph Salerno, the chief investigator, testified regarding photographic lineups that he had held (R 645). In the photographic lineup, there were in excess of forty pictures including three photographs of Sims (R 645-646). Sue Kovec picked out Sims (R 646-647), Colleen Duncan, and Mr. Guggenheim did not pick out any photographs (R 647-648). Baldree was shown a photograph of Sims and said he did not know him (R 648-649).

Sims also presented testimony about Terry Wayne Gale. Gale was a criminal associate of Baldree and Halsell in robberies and burglaries (R 549). They were a team (R 566). Sims was not associated with them (R 550). Gale closely resembled Sims in appearance (R 549).

C. The State's Rebuttal

In rebuttal, the State called William George Dunbar, a former doctor who was then in federal prison on tax and narcotics charges (R 665-666). He said that on January 3rd, Gene Robinson brought an injured man to him in St. Mary's, Georgia (R 668). He said the man had an injury on his left hip (R 668). The wound looked old (R 669) and not like a gunshot wound (R 673). The man with the injury had a salt and pepper beard and hair (R 670-671).

REASONS FOR GRANTING THE WRIT

THE TRIAL JUDGE IN THIS CAPITAL CASE RESTRICTED AND ULTIMATELY CUT OFF PETITIONER'S CROSS-EXAMINATION OF THE KEY PROSECUTION WITNESS, IN VIOLATION OF SIXTH AND FOURTEENTH AMENDMENT GUARANTEES OF CONFRONTATION OF WITNESSES AND OF A FAIR TRIAL.

The trial court interjected, and ultimately abruptly terminated entirely, Mr. Sims' cross-examination of the key prosecution witness, alleged accomplice, Curtis Baldree. The

judge's reason for his sua sponte action was not that the questions being asked were improper or that they covered collateral areas.[2] Rather, the court apparently reasoned that since the witness had testified to these areas on direct examination and since other witnesses had also testified about those areas, Mr. Sims' cross-examination into the matters was repetitive.[3] This case thus involves both the restriction of cross-examination into certain areas and the outright termination of cross-examination into any areas.

Mr. Sims will, first, identify the important constitutional issues presented and, second, s w why his case is the proper vehicle for resolving those issues.

A. THE ISSUES PRESENTED

"There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, 380 U.S. 400, 405 (1965). The Sixth Amendment, made applicable to the states through the Fourteenth Amendment, id. at 403-05, mandates that a criminal defendant has the right "to be confronted with the witnesses against him." The Court's "cases construing the [confrontation] clause hold that a primary interest served by it is the right of cross-examination." Davis v. Alaska, 415 U.S. 308, 316 (1974) (quoting Douglas v. Alabama, 380 U.S. 415, 418 (1968)); see also Ohio v. Roberts, 448 U.S. 56, 63 (1980). The right of cross-examination is an essential safeguard of fact-finding accuracy in an adversary system of justice and "the principal means by which the believ-

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2 The prosecution did not object to the questioning.

3 Curiously, the Florida Supreme Court's opinion did not mention the repetitiveness rationale given by the trial. Rather, the State Supreme Court found that the matters excluded on cross were beyond the scope of direct. 444 So.2d at 924. There are two answers to this. First, the trial court excluded the testimony as cumulative, not as beyond the scope of direct. Indeed, the trial judge excluded the interrogation because he deemed it repetitious of matters covered on direct. Second, the questions were squarely within the scope of direct. Mr. Sims develops this point in his discussion of the specific limitations in this case.

ability of a witness and the truth of his testimony are tested." Davis, 415 U.S. at 316. These "means of testing accuracy are so important that the absence of proper confrontation at trial calls into question the ultimate integrity of the fact-finding process." Roberts, 448 U.S. at 65 (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973) and Berger v. California, 393 U.S. 314, 315 (1969)).

One goal of effective cross-examination is to impeach the credibility of opposing witnesses. The Court in Davis observed that

> the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.

415 U.S. at 317 (citations omitted).

The Court in Davis, while stressing the importance of the right of cross-examination, recognized that a trial judge has discretion[4] to preclude interrogation that is "repetitive." 415 U.S. at 317. The trial judge in this case justified curtailment of cross-examination by finding the questioning cumulative of information adduced on direct examination and revealed

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[4] It is of course true that the scope of cross-examination is a matter within the discretion of the trial court. But this discretionary authority comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment. See United States v. Lindstrom, 698 U.S. 1154, 1160 (11th Cir. 1983); Greene v. Wainwright, 634 F.2d 272, 275 (5th Cir. 1981); United States v. Bass, 490 F.2d 846, 858 n. 12 (5th Cir. 1974).

through other witnesses. This case thus squarely presents the question of the proper scope of the cumulativeness exception to the general rule permitting a full-ranging cross-examination. Specifically, this case asks (1) whether questioning on cross-examination is improperly cumulative if it covers the same ground covered on direct examination of the witness being interrogated;[5] (2) whether cross-examination is improperly cumulative if it covers the same ground covered by other witnesses;[6] (3) whether there is a constitutionally significant difference between a court's limitation of cross-examination into certain discrete subject areas and the court's termination of cross-examination altogether into any subject area;[7] (4) whether a criminal defendant, having shown improper curtailment of cross-examination, must make an additional showing of prejudice in order to make out a violation of the Constitution;[8] (5)

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5 See United States v. Caudle, 606 F.2d 451, 456 (4th Cir. 1979).

6 See Frost v. State, 104 So.2d 77, 80 (Fla. 2d Dist. Ct. App. 1958).

7 Both types of limitation occurred in this case, though the Florida Supreme Court's opinion does not discuss the distinction. See 444 So.2d at 924.

8 In Douglas v. Alabama, 380 U.S. at 420, the Court's statement that the case before it "cannot be characterized as one where the prejudice in the denial of the right of cross-examination constituted a mere minor lapse", could be read as requiring a showing of prejudice. And the Florida Supreme Court, in criticizing Mr. Sims' defense counsel for not asking "for an opportunity to make a proffer to show the relevance of the information it was seeking to bring out," 444 So.2d at 924, seemed to imply that a showing of prejudice is required. But in Davis v. Alaska, the Court refused to "speculate as to whether the jury, as sole judge of the credibility of witness, would have accepted " the line of argument asserted by the defense 415 U.S. at 318. The Court concluded that Davis was "denied the right of effective cross-examination which would "be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Id. at 319 (quoting Brookhart v. Janis, 384 U.S. 1, 3 (1966) and Smith v. Illinois, 390 U.S. 129, 131 (1968)). Similarly, in Alford v. United States, the Court reasoned that

> Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply.... It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them.... To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony

whether the fact that this is a capital case, thus mandating a heightened need for reliability, requires special scrutiny of the abrogation of cross-examination?[9] The remainder of this petition will show why Mr. Sims' case is a proper vehicle for resolution of these important issues.

B. THE VEHICLE

The key witness for the state was Curtis Baldree.[10] Although initially charged with first degree murder and robbery, he was allowed to plead guilty to two misdemeanors in return for his testimony (R 445-446). Baldree testified that he was in the pharmacy conducting the robbery with Sims and he related details of the planning and carrying out of the robbery. Thus, he was an alleged accomplice and unquestionably a very key witness for the prosecution. "The accuracy and truthfulness of [Baldree's] testimony were key elements in the state's case against petitioner." Davis v. Alaska, 415 U.S. at 318. See also United States v. Lindstrom, 698 F.2d at 1163; Greene v. Wainwright, 634 F.2d at 275.

The trial court limited cross-examination of Baldree as "repetitive." The judge never specified precisely what it was repetitive of, but the record of the cross-examination makes clear that counsel was not repeating matters already covered on cross. A reading of the cross-examination reveals plainly that it was orderly and not repetitive. The judge's rulings only make sense if he found repetitiveness in the fact that the defense was questioning in areas covered in the direct examination of Baldree or in the interrogation of other witnesses. And if that is what the judge indeed meant, then his limitations on cross-examination violated the Sixth Amendment.

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in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.

282 U.S. 687, 692 (1931) (citations omitted). See also Davis v. Alaska, 415 U.S. at 318 (noting constitutional dimension of Alford).

9 See Coco v. State, 62 So.2d 892, 895 (Fla. 1953); Hahn v. State, 58 So.2d 188, 191 (Fla. 1952); Williams v. State, 386 So.2d 25, 27 (Fla. 2d Dist. Ct. App. 1980).

10 The Florida Supreme Court noted that Baldree and B. B. Halsell were "the state's chief witnesses" against Sims. Sims v. State, 444 So.2d at 923.

The denial of the right of cross-examination in this case occurred in two general ways. Throughout the cross-examination of Baldree, the judge repeatedly interrupted defense counsel and ordered him to "move on." Finally, the judge cut off cross-examination altogether.

1. Restrictions On What Cross-examination Was Permitted by the Trial Judge.

Throughout defense counsel's cross-examination of Baldree, the trial judge interposed on his own to limit questioning. The judge interrupted and told defense counsel to "move on" more than ten times (in 20 pages of transcript) during his interrogation of this crucial witness (R 456, 460, 461, 462, 463, 466, 468). Five examples suffice to illustrate the limits within which the court permitted cross-examination of Baldree.

First, the judge told defense counsel to "move on" when he was asking Baldree about his ownership of and experience with the gun that Baldree said he used in the robbery and also about the fact that he had fired that weapon at his wife (R 456). Of itself the ownership and uses of the weapon is an aspect of the offense which Sims had an absolute right to probe -- it was testified to in direct examination and was certainly relevant to the offense -- but also at that point counsel was attempting to impeach the witness with an inconsistent statement (R 455). This area of cross-examination is also important since in Baldree's direct examination testimony he had tried to minimize his role in the planning of the offense, almost suggesting it was mere happenstance. Baldree had said it was Robinson's idea and that Robinson furnished the weapons just prior to the robbery (R 428, 430, 433).

The judge interposed a second time while defense counsel was asking Baldree about the purchase and use of certain fingernail polish -- a matter brought out on direct examination (R 428). The following exchange occurred:

> Q. [by defense counsel]: And who bought the nail polish?
>
> A. The best I can remember, it was Halsell.
>
> THE COURT: Let's move on, Mr. Rabinowitz, please.

MR. RABINOWITZ: [Defense counsel] Okay.

THE COURT: I've had enough of that, Mr. Rabinowitz. Let's move on. This has gone for enough. Let's move on.

MR. RABINOWITZ: Yes, Your Honor.

MR. HEFFERNAN [Defense]: Your Honor may counsel approach the bench?

THE COURT: No, Move on.

(emphasis supplied) (R 460-61).

Third, Baldree had testified on direct examination that he took Sims to a Dr. Dunbar on January 3, 1978 (R 444). When defense counsel started to inquire the trial judge interrupted and told counsel that the witness had "already testified to all this once" and instructed counsel not to "be so repetitious." The judge then commanded defense counsel to "move on" (R 463). As in the other areas where the judge interrupted, defense counsel's cross-examination was not repetitive, having never inquired into this area. This was an especially significant area of Baldree's testimony since he had said Sims had been wounded in the offense and that is why he took him to the doctor. Baldree's testimony was questionable -- one witness testified that Baldree was in another faraway city on that date (R 560, 565) and Dr. Dunbar (who did not identify Sims) testified for the State that Robinson, not Baldree, took the wounded man to him (R 669-70).

Fourth, the court sustained an objection to defense questioning concerning Terry Wayne Gale, a person discussed by previous and subsequent witnesses at the trial (R 348-49, 549, 569, 589). One theory of the defense was that it was Terry Gale, not Terry Sims, who committed the robbery with Baldree and Halsell. Terry Gale closely resembled Sims in height and hair length and style; Gale was also similar to Sims in general build except that he was a little heavier (R 349, 549). Gale's close resemblence to Sims could have been the cause of the misidentification of Sims. Also, the first officer on the scene said that the perpetrator had a large head (R 526), not a thin head like Sims. Halsell, the other alleged accomplice, had testified that he had been involved in "quite a few crimes" with Gale (R 349) and that he had previously worked in crime with Baldree (R

323-324). All three were from Jacksonville. Other witnesses testified that Gale, Halsell and Baldree were frequent criminal associates (R 548, 549, 556, 588, 590) and that Sims was not associated with them (R 548, 549, 556). Thus, Sims' attempted cross-examination of Baldree regarding Gale involved a central point in this case. The cross-examination also would have revealed bias by showing a motive for Baldree to lie in order to protect his "associate" while at the same time getting a deal by identifying Sims. The cross-examination also would have laid the foundation for impeachment by other contradictory evidence.

Fifth, the judge interrupted defense counsel's attempt to question Baldree about the remarkable deal he received in exchange for his testimony. (R 466). This time, however, not only did the judge preclude questioning and prevent the witness from answering, but the judge himself gave an answer. Again, the judge's reasoning was that counsel could not question in the area because it was "repetitious" (R 466). But Sims had never examined Baldree about the deal he had made. When defense counsel asked Baldree what deal he had received, the judge interrupted to give an answer and to tell counsel to move on:

> THE COURT: He testified two misdemeanors he got a year apiece and they are running consecutively. Please Mr. Rabinowitz, let's not be repetitious.

(R 465-466). Baldree had testified on direct examination that he had pleaded guilty to two misdemeanors and that "his part of the deal" was "to tell the truth". (R 445-446).[11]

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[11] An alleged accomplice's deal with the state is one of the most important areas affecting the witness's credibility. It is thus one of the areas most strictly guarded by the courts. See, e.g., Davis v. Alaska, 415 U.S. 308 (1974); Cowheard v. State, 365 So.2d 191, 193 (Fla. 3d Dist. Ct. App. 1979); Holt v. State, 378 So.2d 106 (Fla. 5th Dist. Ct. App. 1980); United States v. Mayer, 556 F.2d 245 (5th Cir. 1977). Mr. Sims was denied that right by the trial judge. It is not merely the bare facts that are relevant, as the trial judge assumed. Also highly relevant are the details, expectations, and reasons behind the deal. Equally important is the witness's demeanor in responding to the probing inquiry [Baldree had told Sims' prior attorney that he would do anything to keep the deal. (R 659)].

These examples demonstrate that the trial judge sua sponte[12] restricted Mr. Sims' cross-examination of Baldree.

2. Termination of Cross-examination Altogether.

During the course of defense counsel's cross-examination of Baldree, the trial court abruptly and sua sponte cut off cross-examination altogether.

The judge simply turned to the prosecutor and asked whether he had any further direct examination. The prosecutor said that he did not, and then the judge sent the witness from the stand and courtroom, and called the next witness:

> Q. [by defense counsel] And do you know a man by the name of Terwayne Gale?
>
> A. Very vaguely.
>
> Q. Do you know what Mr. Gale looks like, sir?
>
> A. I'm not sure I know him or not.
>
> MR. DICK [prosecutor]: Objection. Irrelevant and immaterial.

---

12 The court's remarks themselves were prejudicial and emphasized the error. The trial judge's repeated sua sponte interjections, commands and admonitions to counsel throughout Sims' examination of the key state witness, certainly could have affected the jurors. It could have conveyed to the jury that the judge viewed defense counsel's questions or areas of questioning to be insignificant or irrelevant. An important example is the judge's sua sponte giving an answer and stopping cross-examination when Sims' counsel tried to ask Baldree about the deal he had made for his testimony. See Espositio v. State, 243 So.2d 451 (Fla. 2d Dist. Ct. App. 1971). By giving an answer and stopping inquiry, the probability is great that the judge conveyed to the jury that counsel's question was somehow irrelevant and that the deal Baldree got was of little significance as it related to his credibility.

The judge repeatedly interrupted counsel's cross-examination, telling him to "move on", "I've had enough", and "You move on." These continual interjections, apart from the restriction of examination, at best hindered counsel and could have inhibited counsel from giving full representation to his client. As we have shown, there was no reason for the judge's interjection; defense counsel in no way had been argumentative, obstreperous, or was asking improper questions, and throughout the trial was fully respectful to the court. The influence of the trial judge on the jury is "immense, Skelton v. Beall, 133 So.2d 477, 481 (Fla. 3d Dist. Ct. App. 1961); accord Raulerson v. State, 102 So.2d 281 (Fla. 1958), especially in the trial of a capital case, Williams v. State, 143 So.2d 484, 488 (Fla. 1962). Accordingly the Florida Supreme Court has recognized:

> [A] trial court should avoid making any remark within the hearing of the jury that is capable directly or indirectly, expressly, inferentially, or by innuendo of conveying any intimation as to what view he takes of the case or that intimates his opinion as to the weight, character, or credibility of any evidence adduced.

Leavine v. State, 109 Fla. 447, 147 So. 897, 903 (1933); accord Seward v. State, 59 So.2d 529 (Fla. 1952).

THE COURT: The objection is sustained. Any further direct?

MR. DICK: No, sir.

THE COURT: Fine. You may come down, sir. Your next witness.

MR. DICK: The State calls Judith Thompson, Your Honor.

THE COURT: Judith Thompson, please.

(Emphasis supplied) (R 467-68). Defense counsel at that point requested a bench conference and entered his objection to the judge "having cut short" the cross-examination of Baldree (R 468). It was pointed out that "impeachment" of the witness, and "his character and all those things about which he has knowledge which are relevant to this case are at issue before this jury." (R 468). The trial judge refused to consider counsel's arguments: "Because of the repetitiveness I refuse to allow this case to be dragged out interminably." (R 468-470). The judge said "he's made his point three or four times, and the Court considers that more than sufficient" (R 470).

Thus, this case involves not only the restriction of the scope of cross-examination. It also involves the abrupt termination of any cross-examination.

C. CONCLUSION

In this capital case, the trial judge limited relevant cross-examination of a key prosecution witness and then cut off cross-examination altogether. The only reason for this curtailment of the fundamental right of cross-examination was that the interrogation was "repetitive" of areas covered in the direct examination of the witness and in the interrogation of other witnesses. The Court should grant plenary review to determine whether such questioning is indeed "repetitive" under the test articulated in Davis v. Alaska.

Respectfully submitted,

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BY _____
CRAIG S. BARNARD

Counsel for Petitioner

Terry Melvin SIMS, Appellant,

v.

STATE of Florida, Appellee.

No. 57510.

Supreme Court of Florida.

Nov. 3, 1983.

Rehearing Denied Jan. 19, 1984.

Defendant was convicted in the Circuit Court, Seminole County, Tom Waddell, Jr., J., of first-degree murder and robbery, and he appealed. The Supreme Court, Boyd, J., held that: (1) trial court's sustaining of State's objection to certain questioning of a State's witness during cross-examination by defense was not a curtailment of cross-examination requiring reversal; (2) trial judge did not abuse his discretion in denying defendant's request for an evidentiary hearing on whether the exclusion of potential jurors unalterably opposed to the death penalty resulted in a jury predisposed toward conviction; (3) trial court did not err in refusing to allow further questioning of a juror in a posttrial hearing about whether the jurors had considered defendant's not testifying in reaching their verdict; (4) no prejudice arose from denial of defendant's motion to require the State to elect one of two counts submitted to jury; and (5) despite trial court's erroneous findings as to some aggravating circumstances, sufficient aggravating circumstances remained to support sentence of death.

Affirmed.

1. Criminal Law ⇐1036.2

Trial court's ruling sustaining the State's objection to defense counsel's questioning of a State's witness was not a curtailment of cross-examination requiring reversal where the defense was allowed extensive cross-examination of the witness and the State's objection and the court's ruling thereon came only after the defense went into matters beyond the scope of the witness' direct testimony and the defense did not ask for an opportunity to make a proffer to show the relevance of the information it was seeking to bring out.

2. Criminal Law ⇐1169.11

Vague reference by a defense witness to the use of defendant's "mug shot" in a photographic display did not specifically refer to a prior conviction and was not so prejudicial as to require a new trial.

3. Witnesses ⇐414(1)

In prosecution for first-degree murder and robbery, trial judge did not err in excluding from evidence documents corroborative of defense witness' testimony, in that the documents were superfluous to the witness' testimony and were not relevant to a material issue of fact.

4. Criminal Law ⇐1030(1)

Defendant failed to preserve issue for appeal by failing to object at trial.

5. Jury ⇐33(2.1)

In prosecution for first-degree murder and robbery, trial judge did not abuse its discretion by not granting defendant's request for an evidentiary hearing on whether the exclusion of potential jurors unalterably opposed to the death penalty results in a jury predisposed toward conviction.

6. Criminal Law ⇐868

A juror's testimony is relevant only if it concerns matters that do not essentially inhere in the verdict itself.

7. Criminal Law ⇐857(3)

A jury's consideration of a defendant's failure to testify is not the same as considering evidence outside the record, but

rather is an example of its misunderstanding or not following the instructions of the court and such misunderstanding is a matter which essentially inheres in the verdict itself.

8. Criminal Law ⇐868

Trial court did not err in refusing to allow further questioning of juror in a post-trial hearing about whether the jurors had considered defendant's not testifying in reaching their verdict, in that the record showed that the jury was properly instructed that the State had the burden of proving defendant's guilt and that defendant was not required to respond.

9. Criminal Law ⇐1166(1)

In prosecution for first-degree murder and robbery, no prejudice arose from the trial court's denial of defendant's motion to require the State to elect between counts of felony-murder of the victim based upon the robbery of one person and a second count charging felony-murder of the victim based on the robbery of a second person, in that the court in effect consolidated the two verdicts by entering judgment of conviction for a single offense of first-degree murder.

10. Criminal Law ⇐1177

In capital prosecution in which there were no mitigating circumstances found at the sentencing stage, two instances of the trial court giving improper double consideration of or giving separate effect to similar statutory aggravating circumstances was harmless error. West's F.S.A. § 921.141(5)(b-h).

11. Criminal Law ⇐1177

In capital prosecution in which there were no mitigating circumstances, the erroneous finding that the murder was heinous, atrocious, or cruel was harmless error, in light of remaining aggravating circumstances. West's F.S.A. § 921.141(5)(b-h).

12. Criminal Law ⇐1208.1(4)

In capital prosecutions in which there are some aggravating and no mitigating circumstances, death is presumed to be the appropriate punishment. West's F.S.A. § 921.141(5)(b-h).

Richard L. Jorandby, Public Defender and Craig S. Barnard, Chief Asst. Public Defender, Fifteenth Judicial Circuit, West Palm Beach, for appellant.

Jim Smith, Atty. Gen., and James Dickson Crock, Mark C. Menser and Richard B. Martell, Asst. Attys. Gen., Daytona Beach, for appellee.

BOYD, J.

This case is an appeal from judgments of conviction for first-degree murder and robbery and a sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Terry Melvin Sims was convicted for the first-degree murder of George Pfeil, an off-duty deputy sheriff who entered a pharmacy while it was being robbed by Sims and three other men. Two of these other participants, Curtis Baldree and B.B. Halsell, were the state's chief witnesses. They testified that Sims and Baldree armed themselves with pistols and entered the pharmacy, while Halsell and the fourth participant, Gene Robinson, waited in a car a short distance away. Baldree said that he went to the back of the store to rob the pharmacist while Sims stayed at the front of the store watching the door. Sims ordered the customers and employees to the back of the store and into the bathroom. When Pfeil came into the store he and Sims exchanged gunfire. Pfeil was shot twice and Sims was wounded in the hip. Sims and Baldree escaped the scene and later joined their accomplices. The four men then departed the area.

This account of the robbery and the shooting was confirmed by pharmacist Robert Duncan, Duncan's wife and daughter both of whom worked at the store, and two customers who identified appellant. One of the customers, William Guggenheim, testified that he tried to leave the store when he saw a man pointing a gun at the pharmacist. He was stopped by Sims who took his wallet. Guggenheim said he then saw Sims shoot a man who was entering through the front door.

The main theory of defense was mistaken identity. The defense attempted to discredit Baldree and Halsell on the basis of their bad character, drug addiction, criminal records, and the plea arrangements between them and the state. The defense attacked the identification testimony of one of the customers as the product of a suggestive photographic line-up and questioned the testimony of Guggenheim on the basis of his earlier failure to choose appellant from a photographic line-up. The defense then presented evidence of appellant's resemblance to another individual said to be a frequent criminal associate of Baldree and Halsell.

The jury returned verdicts of guilty of first-degree murder and robbery. At the sentencing phase, the state presented a certified copy of a 1971 Orange County conviction for assault with intent to rob. The defense presented witnesses who testified to appellant's good character and difficult background circumstances. The jury recommended death. Finding several aggravating circumstances and no mitigating circumstances, the trial judge adopted this recommendation.

[1] Appellant's first point on appeal is that he was denied his sixth amendment right to cross-examine a witness when the trial court curtailed defense counsel's cross-examination of Baldree. He relies on *Corwell v. State*, 361 So.2d 148 (Fla.1978). The asserted error occurred when defense counsel began questioning Baldree about the individual whom appellant was said to resemble. We do not find that the court's ruling was a curtailment of cross-examination requiring reversal under *Corwell v. State*. Here the defense was allowed extensive cross-examination of the witness and the state's objection and the court's ruling thereon came only after the defense went into matters beyond the scope of Baldree's direct testimony. The defense did not ask for an opportunity to make a proffer to show the relevance of the information it was seeking to bring out. We find no error in the judge's ruling.

[2] Next appellant argues that the trial judge should have granted his motion for mistrial when a witness mentioned using appellant's "mug shot" in a photographic display. Since these words were used by a defense witness and did not specifically refer to a prior conviction, we find that this vague reference to other possible criminal activity was not so prejudicial as to require a new trial. *See Straight v. State*, 397 So.2d 903 (Fla.), *cert. denied*, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981).

[3] Appellant also claims the trial judge erred in excluding from evidence documents corroborative of a defense witness's testimony. Since the documents were superfluous to the witness's testimony and were not relevant to a material issue of fact, we find this point to be without merit.

[4] Next appellant argues that the prosecutor made several improper comments during his closing argument. Since appellant failed to object at the trial, he has failed to preserve this point for appeal. *State v. Cumbie*, 380 So.2d 1031 (Fla.1980); *Clark v. State*, 363 So.2d 331 (Fla.1978).

[5] Appellant's fifth point on appeal is that the trial judge erred by not granting his request for an evidentiary hearing on whether the exclusion of potential jurors unalterably opposed to the death penalty results in a jury predisposed toward conviction. We have held that a defendant is not entitled to have jurors serve on his jury who are unalterably opposed to the death penalty and that a trial judge may excuse such jurors for cause. *Maggard v. State*, 399 So.2d 973 (Fla.), *cert. denied*, 454 U.S. 1059, 102 S.Ct. 610, 70 L.Ed.2d 598 (1981); *Riley v. State*, 366 So.2d 19 (Fla.1978). Since we have previously determined as a matter of law that there is no constitutional infirmity with excluding jurors who because of personal beliefs could not render a verdict of guilty in a capital felony case, the trial judge did not abuse his discretion in denying the request for an evidentiary hearing.

[6-8] Next appellant complains that he was prevented from further questioning a

juror in a post-trial hearing about whether the jurors had considered appellant's not testifying in reaching their verdict. The general rule in Florida is that a juror's testimony is relevant only if it concerns matters which do not essentially inhere in the verdict itself. *Russ v. State*, 95 So.2d 594 (Fla.1957); *Parker v. State*, 336 So.2d 426 (Fla. 1st DCA), *appeal dismissed*, 341 So.2d 292 (Fla.1976). A jury's consideration of a defendant's failure to testify is not the same as considering evidence outside the record, but is rather an example of its misunderstanding or not following the instructions of the court. Such misunderstanding is a matter which essentially inheres in the verdict itself. *Russ v. State; Parker v. State.* We find from the record that the jury was properly instructed that the state has the burden of proving the defendant's guilt and that the defendant is not required to respond. Therefore the court did not err in refusing to allow further questioning of the juror.

[9] Appellant's final argument concerning the guilt phase of the trial is that the trial judge erred in allowing the jury to return verdicts on multiple and inconsistent counts. In one count appellant was charged with premeditated murder or felony-murder of Pfeil based upon the robbery of Duncan. In a second count he was charged with premeditated murder or felony-murder of Pfeil based on the robbery of Guggenheim. Appellant filed a motion to require the state to elect one or the other count on the ground that since there was only one killing he could be found guilty at the very most of only one murder. The trial court denied the motion, finding there was no necessary inconsistency between the two verdicts. We agree with this ruling. *See Reed v. State*, 94 Fla. 32, 113 So. 630 (1927). In essence, the crime of murder was charged by alternative counts of the indictment. The court in effect consolidated the two verdicts by entering judgment of conviction for a single offense of first-degree murder. No prejudice arose from the denial of the motion to elect.

We now consider whether the trial judge properly imposed a sentence of death. As was stated above, the jury recommended the capital sentence. As aggravating circumstances, the trial judge found that appellant had previously been convicted of a felony involving the use or threat of violence, citing a previous conviction for assault with intent to rob and a previous conviction for robbery, section 921.141(5)(b), Florida Statutes (1977); that appellant created a great risk of death to many persons, section 921.141(5)(c); that the capital felony was committed in the course of or in the attempt to commit or in flight after committing a robbery, section 921.141(5)(d); that the murder of the uniformed deputy sheriff was committed for the purpose of avoiding arrest, section 921.141(5)(e); that the murder was motivated by pecuniary gain, section 921.141(5)(f); that the murder was committed to disrupt or hinder the enforcement of the law, section 921.141(5)(g); and that the murder was especially heinous, atrocious, or cruel, section 921.141(5)(h). Finding no statutory mitigating circumstances, the trial judge found that the aggravating circumstances outweighed any mitigating considerations.

Appellant points out several errors in the judge's findings. One is that the judge should not have given separate consideration to circumstances (d), commission during a robbery, and (f), commission for pecuniary gain. *Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). Nor should the judge have considered as separate aggravating circumstances (e), avoiding arrest, and (g), hindering law enforcement. *Clark v. State*, 379 So.2d 97 (Fla. 1979), *cert. denied*, 450 U.S. 936, 101 S.Ct. 1402, 67 L.Ed.2d 371 (1981). The judge also erred in finding that this murder was especially heinous, atrocious, or cruel. *E.g., Maggard v. State; Lewis v. State*, 377 So.2d 640 (Fla.1979); *Cooper v. State*, 336 So.2d 1133 (Fla.1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977).

[10, 11] Since there were no mitigating circumstances, the two instances of improper double consideration of or giving separate effect to similar statutory aggravating circumstances may be regarded as harmless error. We will simply consolidate the separate statutory factors so as to accord them their proper weight. The double recitation of proven factors does not call the propriety of the sentence into question unless it interferes with the mandated process of weighing the circumstances. *Hargrave v. State*, 366 So.2d 1 (Fla.1978), *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979). Similarly, the erroneous finding that the murder was heinous, atrocious, or cruel may be considered harmless error. *Armstrong v. State*, 399 So.2d 953 (Fla.1981).

[12] Despite these errors, therefore, we find that death is still the appropriate penalty. It was properly determined that the capital felony was committed in the course of a robbery, that it was committed for the purpose of avoiding arrest, and that appellant had previously been convicted of life-threatening crimes. Where there are some aggravating and no mitigating circumstances, death is presumed to be the appropriate punishment. *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Therefore, despite the judge's erroneous consideration of some of the aggravating circumstances, there remain several other aggravating circumstances properly found which support the sentence of death.

The judgments of conviction and the sentence of death are affirmed.

It is so ordered.

ALDERMAN, C.J., and ADKINS, BOYD, OVERTON, McDONALD and EHRLICH, JJ., concur.

TAMPA-HILLSBOROUGH COUNTY EXPRESSWAY AUTHORITY, Petitioner,

v.

K.E. MORRIS ALIGNMENT SERVICE, INC., Respondent.

No. 62281.

Supreme Court of Florida.

Nov. 10, 1983.

Rehearing Denied Feb. 22, 1984.

Appeal was taken from judgment of the Circuit Court for Hillsborough County, James A. Lenfestey, J., denying business damages to landowner in connection with partial taking. The District Court of Appeal, 414 So.2d 299, reversed, and the condemnor appealed. The Supreme Court, Boyd, J., held that as a prerequisite to an award of business damages under statute, business must have been in operation at the location for which business damages are claimed for more than five years.

Decision of District Court of Appeal quashed; remanded with instructions.

Adkins, J., dissented.

1. Eminent Domain ⇐122

Although power of eminent domain is inherent feature of sovereign authority of state, Constitution limits this power by requiring that full compensation be paid to owner for property taken. West's F.S.A. Const. Art. 10, § 6(a).

2. Eminent Domain ⇐90, 107

The payment of compensation for intangible losses and incidental or consequential damages in connection with exercise of eminent domain power, including business damages claimed as a result of taking of property adjacent to business, is not required by State Constitution, but is granted or withheld simply as a matter of legislative grace. West's F.S.A. Const. Art. 10, § 6(a).

IN THE SUPREME COURT OF FLORIDA

THURSDAY, JANUARY 19, 1984

TERRY MELVIN SIMS,	**	
Appellant,	**	CASE NO. 57,510
vs.	**	Circuit Court Case No. 78-363-CFA (Seminole)
STATE OF FLORIDA,	**	
Appellee.	**	

The opinion filed November 3, 1983, has been revised.

The motion for rehearing and response thereto, having been considered in light of the revised opinion, is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

cc: Hon. Arthur H. Beckwith, Jr., Clerk
Hon. Tom Waddell, Jr., Judge

Craig S. Barnard, Esquire
Richard B. Martell, Esquire
Hon. Jim Smith

Supreme Court of Florida

No. 57,510

TERRY MELVIN SIMS, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[November 3, 1983]

PER CURIAM.

This case is an appeal from judgments of conviction for first-degree murder and robbery and a sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Terry Melvin Sims was convicted for the first-degree murder of George Pfeil, an off-duty deputy sheriff who entered a pharmacy while it was being robbed by Sims and three other men. Two of these other participants, Curtis Baldree and B. B. Halsell, were the state's chief witnesses. They testified that Sims and Baldree armed themselves with pistols and entered the pharmacy, while Halsell and the fourth participant, Gene Robinson, waited in a car a short distance away. Baldree said that he went to the back of the store to rob the pharmacist while Sims stayed at the front of the store watching the door. Sims ordered the customers and employees to the back of the store and into the bathroom. When Pfeil came into the store he and Sims exchanged gunfire. Pfeil was shot twice and Sims was wounded in the hip. Sims and Baldree escaped the scene and later joined their accomplices. The four men then departed the area.

This account of the robbery and the shooting was confirmed by pharmacist Robert Duncan, Duncan's wife and daughter both of

whom worked at the store, and two customers who identified appellant. One of the customers, William Guggenheim, testified that he tried to leave the store when he saw a man pointing a gun at the pharmacist. He was stopped by Sims who took his wallet. Guggenheim said he then saw Sims shoot a man who was entering through the front door.

The main theory of defense was mistaken identity. The defense attempted to discredit Baldree and Halsell on the basis of their bad character, drug addiction, criminal records, and the plea arrangements between them and the state. The defense attacked the identification testimony of one of the customers as the product of a suggestive photographic line-up and questioned the testimony of Guggenheim on the basis of his earlier failure to choose appellant from a photographic line-up. The defense then presented evidence of appellant's resemblance to another individual said to be a frequent criminal associate of Baldree and Halsell.

The jury returned verdicts of guilty of first-degree murder and robbery. At the sentencing phase, the state presented a certified copy of a 1971 Orange County conviction for assault with intent to rob. The defense presented witnesses who testified to appellant's good character and difficult background circumstances. The jury recommended death. Finding several aggravating circumstances and no mitigating circumstances, the trial judge adopted this recommendation.

Appellant's first point on appeal is that he was denied his sixth amendment right to cross-examine a witness when the trial court curtailed defense counsel's cross-examination of Baldree. The asserted error occurred when defense counsel began questioning Baldree about the individual whom appellant was said to resemble. The record reveals, however, that when the court sustained the state's objection to the questioning, the defense acquiesced in the ruling. It was only after the state had called its next witness that the defense raised the matter of having been "cut short" in cross-examination. Therefore the issue was

not sufficiently raised and preserved for review on appeal. Moreover, we disagree with the argument that the court's ruling was a curtailment of cross-examination requiring reversal under Coxwell v. State, 361 So.2d 148 (Fla. 1978). Here the defense was allowed extensive cross-examination of the witness and the state's objection and the court's ruling thereon came only after the defense went into matters beyond the scope of Baldree's direct testimony. The defense did not ask for an opportunity to make a proffer to show the relevance of the information it was seeking to bring out. We find no error in the judge's ruling.

Next appellant argues that the trial judge should have granted his motion for mistrial when a witness mentioned using appellant's "mug shot" in a photographic display. Since these words were used by a defense witness and did not specifically refer to a prior conviction, we find that this vague reference to other possible criminal activity was not so prejudicial as to require a new trial. See Straight v. State, 397 So.2d 903 (Fla.), cert. denied, 454 U.S. 1022 (1981).

Appellant also claims the trial judge erred in excluding from evidence documents corroborative of a defense witness's testimony. Since the documents were superfluous to the witness's testimony and were not relevant to a material issue of fact, we find this point to be without merit.

Next appellant argues that the prosecutor made several improper comments during his closing argument. Since appellant failed to object at the trial, he has failed to preserve this point for appeal. State v. Cumbie, 380 So.2d 1031 (Fla. 1980); Clark v. State, 363 So.2d 331 (Fla. 1978).

Appellant's fifth point on appeal is that the trial judge erred by not granting his request for an evidentiary hearing on whether the exclusion of potential jurors unalterably opposed to the death penalty results in a jury predisposed toward conviction. We have held that a defendant is not entitled to have jurors serve on his jury who are unalterably opposed to the death penalty and that a trial judge may excuse such jurors for

cause. Maggard v. State, 399 So.2d 973 (Fla.), cert. denied, 454 U.S. 1059 (1981); Riley v. State, 366 So.2d 19 (Fla. 1978). Since we have previously determined as a matter of law that there is no constitutional infirmity with excluding jurors who because of personal beliefs could not render a verdict of guilty in a capital felony case, the trial judge did not abuse his discretion in denying the request for an evidentiary hearing.

Next appellant complains that he was prevented from further questioning a juror in a post-trial hearing about whether the jurors had considered appellant's not testifying in reaching their verdict. The general rule in Florida is that a juror's testimony is relevant only if it concerns matters which do not essentially inhere in the verdict itself. Russ v. State, 95 So.2d 594 (Fla. 1957); Parker v. State, 336 So.2d 426 (Fla. 1st DCA), appeal dismissed , 341 So.2d 292 (Fla. 1976). A jury's consideration of a defendant's failure to testify is not the same as considering evidence outside the record, but is rather an example of its misunderstanding or not following the instructions of the court. Such misunderstanding is a matter which essentially inheres in the verdict itself. Russ v. State; Parker v. State. We find from the record that the jury was properly instructed that the state has the burden of proving the defendant's guilt and that the defendant is not required to respond. Therefore the court did not err in refusing to allow further questioning of the juror.

Appellant's final argument concerning the guilt phase of the trial is that the trial judge erred in allowing the jury to return verdicts on multiple and inconsistent counts. In one count appellant was charged with premeditated murder or felony-murder of Pfeil based upon the robbery of Duncan. In a second count he was charged with premeditated murder or felony-murder of Pfeil based on the robbery of Guggenheim. Appellant filed a motion to require the state to elect one or the other count on the ground that since there was only one killing he could be found guilty at the very most of only one murder.

The trial court denied the motion, finding there was no necessary inconsistency between the two verdicts. We agree with this ruling. See Reed v. State, 94 Fla. 32, 113 So. 630 (1927). In essence, the crime of murder was charged by alternative counts of the indictment. The court in effect consolidated the two verdicts by entering judgment of conviction for a single offense of first-degree murder. No prejudice arose from the denial of the motion to elect.

We now consider whether the trial judge properly imposed a sentence of death. As was stated above, the jury recommended the capital sentence. As aggravating circumstances, the trial judge found that appellant had previously been convicted of a felony involving the use or threat of violence, citing a previous conviction for assault with intent to rob and a previous conviction for robbery, section 921.141(5)(b), Florida Statutes (1977); that appellant created a great risk of death to many persons, section 921.141(5)(c); that the capital felony was committed in the course of or in the attempt to commit or in flight after committing a robbery, section 921.141(5)(d); that the murder of the uniformed deputy sheriff was committed for the purpose of avoiding arrest, section 921.141(5)(e); that the murder was motivated by pecuniary gain, section 921.141(5)(f); that the murder was committed to disrupt or hinder the enforcement of the law, section 921.141(5)(g); and that the murder was especially heinous, atrocious, or cruel, section 921.141(5)(h). Finding no statutory mitigating circumstances, the trial judge found that the aggravating circumstances outweighed any mitigating considerations.

Appellant points out several errors in the judge's findings. One is that the judge should not have given separate consideration to circumstances (d), commission during a robbery, and (f), commission for pecuniary gain. Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977). Nor should the judge have considered as separate aggravating circumstances (e), avoiding arrest, and (g), hindering law

enforcement. Clark v. State, 379 So.2d 97 (Fla. 1979), cert. denied, 450 U.S. 936 (1981). The judge also erred in finding that this murder was especially heinous, atrocious, or cruel. E.g., Maggard v. State; Lewis v. State, 377 So.2d 640 (Fla. 1979); Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925 (1977).

Since there were no mitigating circumstances, the two instances of improper double consideration of or giving separate effect to similar statutory aggravating circumstances may be regarded as harmless error. We will simply consolidate the separate statutory factors so as to accord them their proper weight. The double recitation of proven factors does not call the propriety of the sentence into question unless it interferes with the mandated process of weighing the circumstances. Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919 (1979). Similarly, the erroneous finding that the murder was heinous, atrocious, or cruel may be considered harmless error. Armstrong v. State, 399 So.2d 953 (Fla. 1981).

Despite these errors, therefore, we find that death is still the appropriate penalty. It was properly determined that the capital felony was committed in the course of a robbery, that it was committed for the purpose of avoiding arrest, and that appellant had previously been convicted of life-threatening crimes. Where there are some aggravating and no mitigating circumstances, death is presumed to be the appropriate punishment. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). Therefore, despite the judge's erroneous consideration of some of the aggravating circumstances, there remain several other aggravating circumstances properly found which support the sentence of death.

The judgments of conviction and the sentence of death are affirmed.

It is so ordered.

ALDERMAN, C.J., ADKINS, BOYD, OVERTON, McDONALD and EHRLICH, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA

THURSDAY, JANUARY 19, 1984

TERRY MELVIN SIMS,	**	
Appellant,	**	CASE NO. 57,510
vs.	**	Circuit Court Case No. 78-363-CFA (Seminole)
STATE OF FLORIDA,	**	
Appellee.	**	

The opinion filed November 3, 1983, has been revised.

The motion for rehearing and response thereto, having been considered in light of the revised opinion, is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

C
cc: Hon. Arthur H. Beckwith, Jr., Clerk
Hon. Tom Waddell, Jr., Judge

Craig S. Barnard, Esquire
Richard B. Martell, Esquire
Hon. Jim Smith

Supreme Court of Florida

No. 57,510

TERRY MELVIN SIMS, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[November 3, 1983]

BOYD, J.

This case is an appeal from judgments of conviction for first-degree murder and robbery and a sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Terry Melvin Sims was convicted for the first-degree murder of George Pfeil, an off-duty deputy sheriff who entered a pharmacy while it was being robbed by Sims and three other men. Two of these other participants, Curtis Baldree and B. B. Halsell, were the state's chief witnesses. They testified that Sims and Baldree armed themselves with pistols and entered the pharmacy, while Halsell and the fourth participant, Gene Robinson, waited in a car a short distance away. Baldree said that he went to the back of the store to rob the pharmacist while Sims stayed at the front of the store watching the door. Sims ordered the customers and employees to the back of the store and into the bathroom. When Pfeil came into the store he and Sims exchanged gunfire. Pfeil was shot twice and Sims was wounded in the hip. Sims and Baldree escaped the scene and later joined their accomplices. The four men then departed the area.

This account of the robbery and the shooting was confirmed by pharmacist Robert Duncan, Duncan's wife and daughter both of

whom worked at the store, and two customers who identified appellant. One of the customers, William Guggenheim, testified that he tried to leave the store when he saw a man pointing a gun at the pharmacist. He was stopped by Sims who took his wallet. Guggenheim said he then saw Sims shoot a man who was entering through the front door.

The main theory of defense was mistaken identity. The defense attempted to discredit Baldree and Halsell on the basis of their bad character, drug addiction, criminal records, and the plea arrangements between them and the state. The defense attacked the identification testimony of one of the customers as the product of a suggestive photographic line-up and questioned the testimony of Guggenheim on the basis of his earlier failure to choose appellant from a photographic line-up. The defense then presented evidence of appellant's resemblance to another individual said to be a frequent criminal associate of Baldree and Halsell.

The jury returned verdicts of guilty of first-degree murder and robbery. At the sentencing phase, the state presented a certified copy of a 1971 Orange County conviction for assault with intent to rob. The defense presented witnesses who testified to appellant's good character and difficult background circumstances. The jury recommended death. Finding several aggravating circumstances and no mitigating circumstances, the trial judge adopted this recommendation.

Appellant's first point on appeal is that he was denied his sixth amendment right to cross-examine a witness when the trial court curtailed defense counsel's cross-examination of Baldree. He relies on Coxwell v. State, 361 So.2d 148 (Fla. 1978). The asserted error occurred when defense counsel began questioning Baldree about the individual whom appellant was said to resemble. We do not find that the court's ruling was a curtailment of cross-examination requiring reversal under Coxwell v. State. Here the defense was allowed extensive cross-examination of the witness and the state's objection and the

court's ruling thereon came only after the defense went into matters beyond the scope of Baldree's direct testimony. The defense did not ask for an opportunity to make a proffer to show the relevance of the information it was seeking to bring out. We find no error in the judge's ruling.

Next appellant argues that the trial judge should have granted his motion for mistrial when a witness mentioned using appellant's "mug shot" in a photographic display. Since these words were used by a defense witness and did not specifically refer to a prior conviction, we find that this vague reference to other possible criminal activity was not so prejudicial as to require a new trial. See Straight v. State, 397 So.2d 903 (Fla.), cert. denied, 454 U.S. 1022 (1981).

Appellant also claims the trial judge erred in excluding from evidence documents corroborative of a defense witness's testimony. Since the documents were superfluous to the witness's testimony and were not relevant to a material issue of fact, we find this point to be without merit.

Next appellant argues that the prosecutor made several improper comments during his closing argument. Since appellant failed to object at the trial, he has failed to preserve this point for appeal. State v. Cumbie, 380 So.2d 1031 (Fla. 1980); Clark v. State, 363 So.2d 331 (Fla. 1978).

Appellant's fifth point on appeal is that the trial judge erred by not granting his request for an evidentiary hearing on whether the exclusion of potential jurors unalterably opposed to the death penalty results in a jury predisposed toward conviction. We have held that a defendant is not entitled to have jurors serve on his jury who are unalterably opposed to the death penalty and that a trial judge may excuse such jurors for cause. Maggard v. State, 399 So.2d 973 (Fla.), cert. denied, 454 U.S. 1059 (1981); Riley v. State, 366 So.2d 19 (Fla. 1978). Since we have previously determined as a matter of law that there is no constitutional infirmity with excluding jurors who because of personal beliefs could not render a verdict of guilty in a

capital felony case, the trial judge did not abuse his discretion in denying the request for an evidentiary hearing.

Next appellant complains that he was prevented from further questioning a juror in a post-trial hearing about whether the jurors had considered appellant's not testifying in reaching their verdict. The general rule in Florida is that a juror's testimony is relevant only if it concerns matters which do not essentially inhere in the verdict itself. Russ v. State, 95 So.2d 594 (Fla. 1957); Parker v. State, 336 So.2d 426 (Fla. 1st DCA), appeal dismissed , 341 So.2d 292 (Fla. 1976). A jury's consideration of a defendant's failure to testify is not the same as considering evidence outside the record, but is rather an example of its misunderstanding or not following the instructions of the court. Such misunderstanding is a matter which essentially inheres in the verdict itself. Russ v. State; Parker v. State. We find from the record that the jury was properly instructed that the state has the burden of proving the defendant's guilt and that the defendant is not required to respond. Therefore the court did not err in refusing to allow further questioning of the juror.

Appellant's final argument concerning the guilt phase of the trial is that the trial judge erred in allowing the jury to return verdicts on multiple and inconsistent counts. In one count appellant was charged with premeditated murder or felony-murder of Pfeil based upon the robbery of Duncan. In a second count he was charged with premeditated murder or felony-murder of Pfeil based on the robbery of Guggenheim. Appellant filed a motion to require the state to elect one or the other count on the ground that since there was only one killing he could be found guilty at the very most of only one murder. The trial court denied the motion, finding there was no necessary inconsistency between the two verdicts. We agree with this ruling. See Reed v. State, 94 Fla. 32, 113 So. 630 (1927). In essence, the crime of murder was charged by alternative counts of the indictment. The court in effect consolidated the two

verdicts by entering judgment of conviction for a single offense of first-degree murder. No prejudice arose from the denial of the motion to elect.

We now consider whether the trial judge properly imposed a sentence of death. As was stated above, the jury recommended the capital sentence. As aggravating circumstances, the trial judge found that appellant had previously been convicted of a felony involving the use or threat of violence, citing a previous conviction for assault with intent to rob and a previous conviction for robbery, section 921.141(5)(b), Florida Statutes (1977); that appellant created a great risk of death to many persons, section 921.141(5)(c); that the capital felony was committed in the course of or in the attempt to commit or in flight after committing a robbery, section 921.141(5)(d); that the murder of the uniformed deputy sheriff was committed for the purpose of avoiding arrest, section 921.141(5)(e); that the murder was motivated by pecuniary gain, section 921.141(5)(f); that the murder was committed to disrupt or hinder the enforcement of the law, section 921.141(5)(g); and that the murder was especially heinous, atrocious, or cruel, section 921.141(5)(h). Finding no statutory mitigating circumstances, the trial judge found that the aggravating circumstances outweighed any mitigating considerations.

Appellant points out several errors in the judge's findings. One is that the judge should not have given separate consideration to circumstances (d), commission during a robbery, and (f), commission for pecuniary gain. Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977). Nor should the judge have considered as separate aggravating circumstances (e), avoiding arrest, and (g), hindering law enforcement. Clark v. State, 379 So.2d 97 (Fla. 1979), cert. denied, 450 U.S. 936 (1981). The judge also erred in finding that this murder was especially heinous, atrocious, or cruel. E.g., Maggard v. State; Lewis v. State, 377 So.2d 640 (Fla.

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The judgments of conviction and the sentence of death are affirmed.

It is so ordered.

ALDERMAN, C.J., ADKINS, BOYD, OVERTON, McDONALD and EHRLICH, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

83-6736

ORIGINAL

No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

==========

TERRY MELVIN SIMS,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

==========

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, TERRY MELVIN SIMS, who is now imprisoned in the custody of the Florida Department of Corrections, asks leave to file the accompanying Petition for Writ of Certiorari without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court. Petitioner has proceeded in forma pauperis at all times in the state courts below. Petitioner has attached hereto his affidavit in substantialy the form prescribed by Fed. Rules App. Proc., Form 4, and the Rules of this Court.

Respectfully Submitted,

CRAIG S. BARNARD
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

==========

TERRY MELVIN SIMS,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

==========

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, TERRY MELVIN SIMS,, being first duly sworn, depose and say that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes [ ] No [✓]

a. If the answer is "Yes", state the amount of your salary or wages per month, and give name and address of your employer.

Veleta Mears Construction Co. Marietta Fla.

b. If the answer is "No", state the date of last employment and the amount of the salary and wages per month which you received. Veleta Mears Construction Co. Marietta Fla. $3.25 hr. 1976

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or from self employment? Yes [ ] No [✓]

b. Rent payments, interest or dividends? Yes [ ] No [✓]

c. Pensions, annuities or life insurance payments? Yes [ ] No [✓]

d. Gifts or inheritance? Yes [ ] No [✓]

e. Any other sources? Yes [ ] No [✓]

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months. _____

_____

3. Do you own cash, or do you have money in a checking or saving account? Yes [ ] No [✓] (Include any funds in prison accounts)

If answer is "yes", state the total value of the items owned. 60^{00} as of April 26-1984

_____

4. Do you own any real estate, stocks, bonds, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes [ ] No [✓]

If the answer is "yes" describe the property and state its approximate value. _____

_____

5. List the persons who are dependent upon your support, state your relationship to those persons and indicate how much you contribute toward their support. None

_____

I understand that a false statement to any questions in this affidavit will subject me to penalties for perjury.

"I declare under penalty of perjury that the foregoing is true and correct."

Terry M. Sims

Signature of Petitioner

STATE OF FLORIDA)

COUNTY OF BRADFORD)

TERRY MELVIN SIMS, being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

X Terry M. Sims
Signature of Petitioner

SUBSCRIBED and SWORN to before me this 1 day of May, 1984.

Dianne A. Jennings
NOTARY PUBLIC

My Commission Expires: